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No. 88-830

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

QUALITY INN SOUTH, MANIBHAI PATEL, DILIP PATEL, SUMANI CORP., INC.,
Petitioners

v.

RAJNI J. PATEL,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

GEORGE M. BOLES
BOLES & DAVIS
615 Frank Nelson Bldg.
Birmingham, AL 35203
(205) 251-6602

BOB HUMPHRIES
208 Gunn Road
Montgomery, AL 36117
(205) 277-9222

MAX ZIMNY
CATHERINE WAELDER
1710 Broadway
New York, NY 10019
(212) 265-7000

STEPHEN P. BERZON
MICHAEL RUBIN
Counsel of Record
ALTSHULER & BERZON
177 Post Street, #300
San Francisco, CA 94108
(415) 421-7151

Counsel for Respondent

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

1. Whether Congress, in enacting the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 ("IRCA"), amended *sub silentio* the definition of covered "employee" under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA"), to exclude undocumented alien workers from FLSA coverage.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Rajni J. Patel respectfully asks this Court to deny the Petition for Writ of Certiorari seeking review of the Eleventh Circuit's opinion in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 846 F.2d 700 (11th Cir. 1988), and is reprinted at Pet. 1b-13b. The opinion of the United States District Court for the Northern District of Alabama is reported at 660 F. Supp. 1528 (N.D. Ala. 1987), and is reprinted at Pet. 1a-17a.

ADDITIONAL STATUTES INVOLVED

1. Section 274A(a)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(a)(1)(A), provides:

> It is unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States—
>
> (A) an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to such employment . . . .

2. Section 101(a)(3)(A) of IRCA provides:

> Section 274A(a)(1) of the Immigration and Nationality Act shall not apply to the hiring, or recruiting or referring of an individual for employment which has occurred before the date of the enactment of this Act.

3. Section 111(d) of IRCA, Pub. L. 99-603, provides:

> (d) SUPPLEMENTAL AUTHORIZATION OF APPROPRIATIONS FOR WAGE AND HOUR ENFORCEMENT—There are authorized to be appropriated, in addition to such sums as may be available for such purposes, such sums as may be necessary to the Department of Labor for enforcement activities of the Wage and Hour Division and the office of Federal Contract Compliance Programs within the Employment Standards Administration of the Department in order to deter the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens.

REASONS FOR DENYING THE WRIT

Although petitioners devote more than two dozen pages to a general discussion of immigration and labor policies, this case raises only a single narrow issue of statutory construction—whether Congress intended undocumented alien workers to be eligible for back pay and liquidated damages awards under the Fair Labor Standards Act.

Pet. at 24. There are at least five reasons why this Court should not grant *certiorari* to consider that issue in the context of this case.

1. First, there is no conflict between the circuits. Every court to have considered the FLSA rights of undocumented aliens has concluded that Congress intended to provide statutory coverage and the full range of remedial protections to undocumented alien workers who have been the victims of wage or hour discrimination. *See, e.g., Local 512, Warehouse and Office Workers v. NLRB*, 795 F.2d 705, 718 n.12 (9th Cir. 1986); *Brennan v. El San Trading Corp.*, 73 Lab. Cas. (CCH) ¶ 33,032, at 46,362 (W.D. Tex. 1973); *Alvarez v. Sanchez*, 105 A.D.2d 1114, 482 N.Y.S.2d 184, 195 (1984). The Eleventh Circuit's decision is fully consistent with these cases.

2. Second, even accepting petitioners' broad characterization of the issue as whether, in light of IRCA, "illegal immigrant workers have the same employment-related rights as citizen and legal resident alien workers" (Pet. at 10), there is still no circuit conflict. Petitioners cite numerous lower court decisions, both pre-IRCA and post-IRCA, addressing the statutory coverage and remedial rights of undocumented aliens in other federal statutory contexts. But these cases all hold that undocumented aliens *are* entitled to statutory protection. See Pet. at 13-14, 18-20 (citing cases under the National Labor Relations Act, the Service Contract Act, the Longshore & Harbor Workers' Compensation Act and the Migrant and Seasonal Agricultural Worker Protection Act); see also *Rios v. Enterprise Assoc. Steamfitters Local Union No. 638*, 860 F.2d 1168, 1171-73 (2d Cir. 1988) (holding, in a pre-IRCA case, that undocumented aliens are entitled to backpay under Title VII). Thus, even viewing the issue in its broadest possible context, the only conflict identified by petitioners is with "the District Court's decision and two dissents in lower court

decisions" (Pet. at 20)—hardly the stuff of which *certiorari* is made.

3. Third, FLSA coverage of undocumented alien workers is supported by the consistent and longstanding construction of the FLSA by the United States Department of Labor, the agency charged with statutory implementation. Since 1942, the Labor Department has held that the FLSA protects all "individuals," documented and undocumented alike. See Pet. at 7b. Moreover, the Labor Department has adhered to that position even after enactment of IRCA. *Ibid.* So important to the Department is its construction of the FLSA that it filed a separate *amicus curiae* brief in support of respondent Patel in this case; and it requested and obtained permission for the U.S. Solicitor of Labor personally to participate at oral argument in support of respondent's position. This longstanding administrative construction was appropriately given substantial deference by the Eleventh Circuit. *Ibid, citing Tony and Susan Alamo Foundation v. Sec'y of Labor*, 471 U.S. 290 (1985).[1]

4. The Eleventh Circuit provided numerous reasons to support its conclusion that Congress intended, even after IRCA, to provide backpay and liquidated damages remedies to undocumented alien victims of FLSA wage and overtime discrimination. Nothing in the petition casts doubt upon the court's analysis.

First, the Eleventh Circuit focused on the plain language of § 3(3) of the FLSA, which defines "employee."

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[1] Just as the Labor Department supported respondent Patel's position in this case, based on its expertise and experience in administering the FLSA, so too did the EEOC file a supporting *amicus* brief in the Eleventh Circuit, drawing from its experience in administering Title VII, to reiterate that agency's long-held view that undocumented alien workers were entitled to statutory protection under that federal statute. The EEOC's parallel construction of Title VII further supports the Eleventh Circuit's decision in the present case.

Noting that "it would be difficult to draft a more expansive definition," the Eleventh Circuit emphasized that the Act broadly defines "employee" to include "any individual employed by an employer," and that although the Act contains a series of specific exemptions, "none of these exemptions concern immigration status." Pet. at 4b.

Next, the court addressed the FLSA legislative history and the numerous judicial decisions construing that legislative history. Pet. at 5b-6b. That evidence of Congressional purpose further supported the court's conclusion "[t]hat Congress intended a broad definition of the term 'employee,'" and that the courts have "consistently . . . refused to exempt from coverage employees not within a specific exemption." *Ibid.*

Having concluded that "[n]othing in the FLSA or its legislative history suggest that Congress intended to exclude undocumented workers from the act's protections" (Pet. at 7b), the Eleventh Circuit then turned its attention to IRCA itself, and to petitioners' contention that IRCA had implicitly repealed the FLSA's coverage provisions. The court rejected this argument, recognizing that "amendments by implication are disfavored," and that "[o]nly when Congress' intent to repeal or amend is clear and manifest will we conclude that a later act implicitly repeals or amends an earlier one." Pet. at 8b, *citing Rodriquez v. United States*, —— U.S. ——, 107 S.Ct. 1391, 1392 (1987); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976). In this case, the court found that "*nothing* in IRCA or its legislative history suggest that Congress intended to limit the rights of undocumented aliens under the FLSA," and that "the FLSA's coverage of undocumented aliens is fully consistent with the IRCA and the policies behind it." Pet. at 8b (emphasis added).

Two expressions of legislative intent particularly supported the Eleventh Circuit's conclusion. First, the court

relied upon the House Education and Labor Committee Report to IRCA, which expressed Congress's intent *not* to undermine existing labor law protections for undocumented aliens, by stating:

> [T]he committee does not intend that any provision of the Act would limit the powers of State or Federal labor standards agencies such as the . . . *Wage and Hour Division of the Department of Labor* . . . in conformity with existing law, to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by those agencies. To do otherwise would be counter-productive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by the employment.

Pet. at 9b, *quoting*, H.R. Rep. No. 99-682(II), 99th Cong., 2d Sess. at 8-9 (1986) (emphasis in opinion).[2] Second, the court quoted the statutory language of IRCA itself, specifically § 111(d), which *increased* FLSA enforcement on behalf of undocumented aliens, by stating:

> There are authorized to be appropriated, in addition to such sums as may be available for such purposes, such sums as may be necessary to the Department of Labor for enforcement activities of the Wage and Hour Division . . . in order to deter the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens.

Pet. at 9b, *quoting* Pub. L. No. 99-603, § 111(d), 100 Stat. 3357, 3381 (1986). As the Eleventh Circuit con-

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[2] *See also* H. Rep. No. 99-682(I), 99th Cong., 2d Sess. at 58 (1986) ("It is not the intention of the [House Judiciary] Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of . . . labor standards agencies . . . to remedy unfair labor practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law").

cluded, "[t]his provision would make little sense if Congress had intended the IRCA to repeal the FLSA's coverage of undocumented aliens." *Ibid.*

The Eleventh Circuit also analyzed in detail why federal immigration policies would be served, rather than undermined, by its ruling. As the court stated:

> [T]he FLSA's coverage of undocumented aliens goes hand in hand with the policies behind the IRCA. Congress enacted the IRCA to reduce illegal immigration by eliminating employers' economic incentive to hire undocumented aliens. To achieve this objective the IRCA imposes an escalating series of sanctions on employers who hire such workers. *See* 8 U.S.C. § 1324a. The FLSA's coverage of undocumented workers has a similar effect in that it offsets what is perhaps the most attractive feature of such workers—their willingness to work for less than the minimum wage. If the FLSA did not cover undocumented aliens, employers would have an *incentive* to hire them. Employers might find it economically advantageous to hire and underpay undocumented workers and run the risk of sanctions under the IRCA.
>
> We recognize the seeming anomaly of discouraging illegal immigration by allowing undocumented aliens to recover in an action under the FLSA. We doubt, however, that many illegal aliens come to this country to gain the protection of our labor laws. Rather it is the hope of getting a job—at any wage —that prompts most illegal aliens to cross our borders. By reducing the incentive to hire such workers the FLSA's coverage of undocumented aliens helps discourage illegal immigration and is thus fully consistent with the objectives of the IRCA. We therefore conclude that undocumented aliens continue to be "employees" covered by the FLSA.

Pet. at 9b-10b (emphasis in opinion). In other words, the court found that the congressional immigration policies would be furthered by granting continued FLSA

protection to undocumented aliens, because if employers could engage in wage discrimination against those workers without fear of reprisal, employers would have an incentive to violate the law by hiring such workers, notwithstanding the employer sanctions provisions.

Petitioners have not offered a single persuasive reason why this Court should question the Eleventh Circuit's decision. Indeed, petitioners' only legal argument in support of *certiorari* review is that under *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), the lower courts are required to consider the impact of federal immigration law interests on any statutory remedy under the federal labor laws. See Pet. at 16-17. But the Eleventh Circuit plainly *did* consider this impact, and the court properly resolved that impact in favor of continued FLSA coverage, basing its analysis on express statements of legislative intent. See Pet. at 9b-10b.[3]

5. Finally, even if the Court were inclined to consider whether IRCA implicitly repealed the FLSA's statutory coverage, this is not the proper case for such consideration. This is *not* a case, as characterized by petitioners, which "represents a clear presentation of the issues, unclouded by significant extraneous questions." Pet. at 23. Rather, because Patel's last date of employment occurred well before the November 6, 1986 effective date of IRCA,

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[3] In *Sure-Tan*, this Court held that undocumented aliens were "employees" under the NLRA; but it denied a backpay remedy to the aliens in that case, who had accepted voluntary departure (after an INS raid) and were home in Mexico throughout their backpay periods. 467 U.S. at 898-905. Both the Ninth Circuit and the Second Circuit have construed *Sure-Tan* as *not* foreclosing an award of backpay to aliens who remained in this country, and were therefore "available in fact" for work, during their backpay periods. *Local 512, Warehouse and Office Worker's Union v. NLRB*, *supra*, 795 F.2d at 715-20; *Rios v. Enterprise Assoc. Steamfitters Local Union No. 638*, *supra*, 860 F.2d at 1172-73. The Eleventh Circuit found it unnecessary to reach the issue, because in an action for unpaid minimum wages and overtime under the FLSA, the affected alien *did* work. Pet. at 12b.

it is likely that this Court would not reach the issue of post-IRCA remedies under the FLSA, even if *certiorari* were granted.

Respondent Patel was employed by petitioners from July 1983 through October 1985. As petitioners themselves realize, any violation of the FLSA therefore occurred prior to the November 6, 1986 enactment of IRCA. Pet. at 23. Petitioners contend that this is irrelevant, arguing that "the key time period for determining whether illegal immigration is encouraged is when the remedy is provided," rather than when the violation occurred. *Ibid.* But whether an implied repeal should apply to conduct predating the effective date of IRCA is a question of congressional intent and equitable balancing. *See generally Bennett v. New Jersey*, 470 U.S. 632, 638-41 (1985); *DeGurules v. INS*, 833 F.2d 861, 863 (9th Cir. 1987). And the only court to consider this issue in the context of IRCA has held that IRCA is *not* retroactive, and that its enactment does *not* affect the backpay rights of undocumented aliens who suffered injuries before IRCA's enactment. *Rios v. Enterprise Assoc. Steamfitters Local Union No. 638*, *supra*, 860 F.2d at 1172 n.2, *citing* 8 U.S.C. § 1324a(i). Accordingly, there is a substantial likelihood that this Court would not reach the principal issue asserted by petitioners, even if *certiorari* were granted.

The dates of Patel's employment also have great significance under the employer sanctions provisions of IRCA. Even if Patel had continued working for petitioners after November 6, 1986 (the effective date of IRCA), he would have been considered a "grandfathered" employee within the meaning of that statute. As such, his continued employment could not have subjected petitioners to statutory sanctions.[4] Since petitioners' argu-

[4] *See* IRCA § 101(a)(3)(A) (IRCA's employer sanctions provision "shall not apply to the hiring, or recruiting or referring of an individual for employment which has occurred before the date of the enactment of this Act").

ments rest largely on the perceived conflict between the remedial rights provided by the federal labor laws and the employer sanctions provisions of IRCA, the fact that sanctions would in any event be unavailable in this case means that the perceived conflict—at least in the context of a grandfathered employee like Rajni Patel—is wholly illusory. Whether or not one agrees with petitioners' assertion that "[t]he single most important change made by the 1986 law was to criminalize the hiring of illegal aliens" (Pet. at 20), one cannot contest that such criminalization does *not* apply to the hiring (or continued employment) of workers who, like respondent Patel, were hired before the effective date of the 1986 IRCA amendments. The fact that this case could be decided on either of these two grounds, rather than upon the issue raised, is yet another ground for denying *certiorari* review. See *Monrosa v. Carbon Black, Inc.*, 359 U.S. 180, 184 (1959); *McCarthy v. Bruner*, 323 U.S. 673 (1944); *Williams v. Zuckert*, 371 U.S. 531, 532-33 (1963); *Belcher v. Stengel*, 429 U.S. 118, 118-20 (1976).

CONCLUSION

For the reasons stated, respondent Rajni Patel hereby requests that the Petition For Writ of Certiorari be DENIED.

Respectfully submitted,

GEORGE M. BOLES
BOLES & DAVIS
615 Frank Nelson Bldg.
Birmingham, AL 35203
(205) 251-6602

BOB HUMPHRIES
208 Gunn Road
Montgomery, AL 36117
(205) 277-9222

MAX ZIMNY
CATHERINE WAELDER
1710 Broadway
New York, NY 10019
(212) 265-7000

STEPHEN P. BERZON
MICHAEL RUBIN
Counsel of Record
ALTSHULER & BERZON
177 Post Street, #300
San Francisco, CA 94108
(415) 421-7151

Counsel for Respondent